



BUILDING AND SUSTAINING A DEMOCRATIC CONSTITUTION:
THE CASE OF SOUTH AFRICA

1999-2000

By: Richard Simeon and Christina Murray

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**BUILDING AND SUSTAINING A DEMOCRATIC CONSTITUTION:
THE CASE OF SOUTH AFRICA**

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The Course:

South Africa is a country that is marked by an oppressive historical legacy and by enormous inequality. The democratic constitution that it adopted in 1996 represents at once the essential compromise necessary to bring the country peacefully from apartheid to multi-racial democracy; and a blueprint for the future. This course presents a close analysis of the 1996 constitution:

- How did it come about?
- What choices were made, and why?
- What are the implications of these choices for South Africa?

We will analyze the Constitution in terms of a number of central themes that have faced constitutional designers in many countries, not least Canada.

- Does it provide a framework for democratic government – for citizen participation, transparency, and accountability?
- Does it provide a blueprint for effective government, able to make and implement the policies needed to effect transformation in South Africa?
- Does it provide the framework for consolidating and sustaining democratic and effective government?
- Does it provide a framework for transcending the past, and building the future?

The questions we address in the course, and the materials we read, are not those typically asked by lawyers. We look at very few cases. Rather, we focus on the broad questions of governance that underpin any constitutional order. We also spend little time on one large issue that has greatly preoccupied constitutional scholars – the rights of citizens. This will be the central theme addressed in the companion course taught by Justice Albie Sachs. Here, our concern is less with the citizen as a bearer of rights, and more with the citizen as a participant in politics and as the subject of government action.

Requirements:

The course will be taught as a discussion seminar. It is therefore essential that students complete the reading in order to participate effectively.

One 10-12 page 'reflective paper' will be required.

Those students who take Justice Sachs' course in addition to this one, will be permitted to write a single paper of 20 to 25 pages to satisfy the requirements of both courses.

Materials:

All materials for the course are found in the volume of readings available at the Law School. In addition to the assigned readings, students will be expected to have read the relevant sections of the South African Constitution, which are found at the beginning of the volume.

These materials bring a number of different perspectives to the South African constitutional experience. They include, in addition to scholarly works from several disciplines, a number of speeches, personal commentaries, and excerpts from legislation and other government documents. These, along with a number of videos to be shown, are designed to convey a vivid sense of the real world of citizens and leaders engaged in a difficult process of transformation.

1. Introduction: South Africa and the Challenge of Constitutionalism

A. The course

- The purposes of a constitution: citizens, democracy, and effective governance
- Building and consolidating a constitution
- The Canadian comparison

B. The South African Legacy

- From apartheid to a democratic constitution

Reading:

S E Finer, Vernon Bogdanor and Bernard Rudden 'On whether constitutions matter' in *Comparing Constitutions* pp 1 - 5

Allister Sparks 'The Status of the Dream'

'State of the Nation Address' President Nelson Mandela, Cape Town, May 24, 1994

2. Constitutional Process and Issues in Constitutional Design

- Writing South Africa's Constitution
- Central elements in constitutional design

Reading:

SA Constitution - Preamble and chapter 1

Courtney Jung and Ian Shapiro, 'South Africa's Negotiated Transition: Democracy, Opposition and the New Constitutional Order, in Ian Shapiro, Democracy's Place. Ch. 7.

3. Coming to terms with the past: The Truth and Reconciliation Commission

- Explaining the TRC: part of the deal
- Retribution vs reconciliation
- Holding individuals and institutions to account?
- Truth-telling, amnesty and reparation

Reading:

Andre du Toit 'Laying the Past to Rest' (1994) 11 *SA Indicator* 63 - 69

Promotion of National Unity and Reconciliation Act, 34 of 1995 - Preamble and section 20

Graeme Simpson "Tell no lies, claim no easy victories" South Africa's Truth and Reconciliation Commission'

Mahmood Mamdani 'Reconciliation without Justice' (November/December 1996) 46 *Southern African Review of Books*

Antjie Krog *Country of my Skull - Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (1998) chapters 3 and 10.

4. Connecting Citizens and Government

- Elections and the electoral system
- Citizen participation
- Accountability
- Who is represented? Citizens or parties

Readings:

SA Constitution - ss 16 - 19, 32, 46, 47, 59, 181, 190 and 193

Pippa Norris 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 297 - 312

C M Murray 'Elections in South Africa' (a brief description of the electoral system used in 1994 and 1999)

Tom Lodge 'Which criteria are most important in choosing an electoral system for post-1999 South Africa' unpublished paper (October 1998)

Three short articles on the Independent Electoral Commission

New National Party v The Government of South Africa Constitutional Court Case CCT 9/99 paras - Langa DP's judgement (edited)

Hans H Klein 'The Party-Related Mandate in South Africa's New Constitution'

In re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) paras 180 - 187

Rosemary Proctor, 'A Canadian reflects on the second democratic election.'

5. Organizing Power: Executives, Legislatures and the Separation of Powers

- Westminster model vs separation of powers

- The legislature - deliberation, policy making and oversight?
- The President and Cabinet - transformation and effective government?
- 'State institutions supporting constitutional democracy'

Reading:

SA Constitution - ss 42, 55, 83 - 6, 91 - 2, 101 - 102.

Richard Calland, 'All Dressed Up with Nowhere to Go: The Rapid Transformation of the South African parliamentary Committee System.'

Gregory S Mahler 'The "Westminster Model" away from Westminster: Is it always the appropriate model?' in *Designs for Democratic Stability - Studies in Viable Constitutionalism* ed Abdo I Baaklini and Helen Desfosses (1997) p 35 - 51

6. Organizing Power: Multilevel Governance

- Why multilevel governance in South Africa?
- A highly centralised federal regime
- NCOP: Representing provinces at the centre
- The problem of provincial and local capacity

Reading:

SA Constitution - Chapter 3 (ss 40 and 41), ss 44(2), 60, 75, 76, 146, 214, 227, 100, 139, Schedules 4 and 5

Richard Simeon 'Considerations on the Design of Federations: the South African Constitution in Comparative Context' (1998) 13 *SA Public Law* 42

C M Murray 'National, provincial and local government and the South African Constitution: A summary' (a description of the SA system of multi-level government)

Provincial Review Commission Report (1997) - executive summary

'Address of Premier Ndaweni Mahlangu at the opening of the Mpumalanga legislature' July 6, 1999

7. Judges and Courts

- Old judges, new regime
- Responsibility for the past
- Preparation for the future

Reading:

SA Constitution - ss 165, 174, 176, 177 and 178

'The Truth and Reconciliation Commission, and the Bench: Written submissions - Chief Justice Corbett, and Justices Langa, Ackermann and Goldstone' (1998) 115 *South African Law Journal* 17 - 20, 36 - 41, 51 - 6 and 436 - 8.

David Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) pp 178 - 83

8. Conclusion: How Safe is Democracy in South Africa?

- A legitimate Constitution?
- A framework for effective governance?
- A framework for democratic governance?
- A framework for transformation?
- A bridge from the past - blueprint for the future?

A Przeworski et al 'What makes democracies endure?'

President Thabo Mbeki's opening address to Parliament - June 25, 1999

Rosemary Proctor, 'A Canadian's reflections on delivering effective governance at the grass roots.'

